KETUA PENGARAH HASIL DALAM NEGERI A

v.

STERUDA SDN BHD

COURT OF APPEAL, PUTRAJAYA B
SURIYADI HALIM OMAR JCA
ZAINUN ALI JCA
WAN ADNAN MUHAMAD JCA
[CIVIL APPEAL NO: W-01-52-04]
31 MARCH 2009 C

REVENUE LAW: *Income tax - Year-end payment of 25% net profit - Whether bonus payment - Whether part of salary and deductible - Income Tax Act 1967, ss. 33, 39*

REVENUE LAW: *Income tax - Bonus - Interpretation of - Whether parties intended deferred payment as part of remuneration or as bonus payment - Whether intention a cogent factor in determining whether a "bonus" within the Act - Income Tax Act 1967, ss. 33, 39* D

The respondent was a private limited company providing consultancy services in gynaecology, obstetrics and other branches of medicine. The respondent entered into an employment agreement with one Dr. McCoy, a shareholder and director of the respondent. Dr. McCoy was to be paid RM3k per month plus an annual 25% of the net profit of the clinic conducted ('25% net profit'). The appellant, the Director General of Inland Revenue, in revising the tax computations of the respondent, disallowed the deduction of the 25% net profit and considered it a bonus payment caught by s. 39(1) of the Income Tax Act 1967 ('the Act'). Section 39(1)(h) did not allow deductions of any sum paid by way of a bonus to an employee in excess of two twelfths of his wages or salary. *[Editor's note: Section 39(1)(h) has been deleted by s. 5 of the Finance Act 2002 - Act 619].* The respondent appealed to the appellant but was unsuccessful. The case went before the Special Commissioners ('SC') and the respondent failed to convince them that the 25% net profit was part of Dr. McCoy's remuneration. The matter was then referred to the High Court by way of case stated pursuant to para. 34 of the Fifth Schedule to the Act. The learned judge, in favour of the respondent, concluded that: (1) the sum of RM3k per month did not commensurate with the status of Dr. McCoy as a consultant and E F G H I

A senior obstetrician and gynaecologist; (2) RM3k per month was only part of his total remuneration with the 25% net profit being a method of calculating the rest of his salary; (3) the fact that the 25% net profit was over and above the monthly sum of RM3k did not mean that the balance sum must be a bonus, and (4) the SC
B erred in failing to give due consideration to the fact that the payment to Dr. McCoy comprised two parts of a single contractual obligation. The appellant now appealed against the learned judge's decision and submitted three cases in support, *ie*, *Saledy Sdn Bhd v. Director General of Inland Revenue, Director General*
C *of Inland Revenue v. Highlands Malaya Plantation* and *Director General of Inland Revenue v. Harrisons and Crosfield (M) Sdn Bhd.*

Held (dismissing the appeal)
Per Suriyadi Halim Omar JCA delivering the judgment of
D **the court:**

(1) The *Director General of Inland Revenue v. Highlands Malaya Plantation* and the *Director General of Inland Revenue v. Harrisons and Crosfield (M) Sdn Bhd* could easily be
E distinguished with the current appeal based on the facts and the distinguishing factors in the respective agreements. In the *Harrisons and Crosfield* case, the controversial bonus was compartmentalised under a separate and special heading called the Additional Remuneration Scheme. Under that
F heading, selected managerial staff was entitled to participate in profits under the rules of the latter scheme. It had a discretionary quality, unlike salaries that were beyond adjustment or review on the whims and fancies of the employer. The remuneration under that heading was over
G and above the salary given to the selected managerial staff and was treated as bonus payment. (para 17)

(1a) In the *Highlands Malaya Plantation* case, the approach of the respondent therein was similar to that of *Harrisons and Crosfield,* in that the managerial staff was entitled to
H participate in the group bonus scheme in accordance with the standard letter of appointment. The clerical staff was each paid a bonus at the discretion of the respondent. The court concluded that the payment could be gratuitous as in the case of the non-managerial staff or contractual payment
I to which managerial staff was entitled to as incentive but

nevertheless still a bonus. It was an undeniable fact too that both groups were paid from the very beginning pursuant to a scheme that carried the word "bonus" and with the additional remuneration being subject to the discretion of the respondent. (para 17)

(2) The case of *Saledy Sdn Bhd v. Director General of Inland Revenue* was of no assistance to the present case as the learned judge in that case never at any time discussed how he arrived at the conclusion that the additional remuneration was a bonus payment. (para 17)

(3) There was nothing sinister in the manner the respondent framed its terms herein. It was merely arranging its business and financial affairs in such a way that would minimise its tax liability. That mode of tax avoidance would result in the lowest possible income tax for itself, a course of action that was rational and legal. Opposed to that was tax evasion where taxpayers understate their taxable income or claim fictitious deductions and thus illegal. (para 19)

(4) There was no statutory definition of the word "bonus" in the Act. For assistance, reference should be made to other sources to arrive at the meaning of the word, and in the circumstances of the case, whether payment to Dr. McCoy fell under it. The sources indicate that bonus payment was in addition to the wages paid to an employee, over and above the agreed remuneration. It might be in the nature of a gift, a temporary boon or something freely given at the discretion of the giver as opposed to being an agreed normal remuneration and included payment which was legally due or contractually provided for. In the present case, the presence of intention to make the deferred payment as part of his remuneration and not a bonus payment was a cogent factor in determining the said issue. (paras 20, 24 & 25)

(5) Dr. McCoy's employment document was contractual in nature and the company was bound by it. A simple reading of the agreement showed that the 25% net profit payment was not at the discretion of anyone, it being part and parcel of the salary agreement. Nothing was said of percentages in relation to the salary but rather to a deferred ascertainable

profit at the end of the year. There was nothing complicated about the employment agreement and at the end of the day it was just a question of construction of the relevant document, the facts of the case and the relationship between the relevant parties. (para 26)

(6) The income of one other medical practitioner submitted for comparison purposes far surpassed Dr. McCoy's income and inevitably led to the conclusion that the contractual 25% net profit payment must surely be part of Dr. McCoy's earnings. The salary of RM3k did not commensurate with a consultant's status and qualification and the deferred payment was by no means a bonus payment. It was part of his hard-earned income, though deferred and subject to profitability as intended by the parties. There was no necessity to adduce cogent evidence to establish that Dr. McCoy's income did not commensurate with his status as a consultant as correctly found by the learned judge. (para 28)

Bahasa Malaysia *Translation Of Headnotes*

Responden adalah sebuah syarikat sendirian berhad yang memberikan perkhidmatan konsultansi dalam bidang ginaekologi, obstetrik dan lain-lain bidang perubatan. Responden memeterai satu perjanjian pekerjaan dengan seorang Dr. McCoy, seorang pemegang saham dan pengarahnya, di mana Dr. McCoy dibayar gaji sebanyak RM3ribu sebulan serta 25% dari keuntungan tahunan bersih klinik ('25% keuntungan bersih'). Perayu, Ketua Pengarah Hasil Dalam Negeri, dalam menyemak tanggungan cukai responden, tidak membenarkan pemotongan 25% keuntungan bersih dan menganggapnya sebagai bayaran bonus yang tertakluk kepada s. 39(1) Akta Cukai Pendapatan 1967 ('Akta'). Seksyen 39(1)(h) tidak membenarkan pemotongan dibuat terhadap mana-mana wang yang dibayar kepada pekerja sebagai bonus yang melebihi satu perduabelas gajinya. *[Seksyen 39(1)(h) telah dimansuh oleh s. 5 Akta Kewangan 2002 - Akta 619: Pengarang]*. Responden merayu kepada perayu tetapi gagal. Kes dibawa ke hadapan Pesuruhjaya Khas ('SC') namun responden gagal meyakinkan SC bahawa 25% keuntungan bersih adalah sebahagian dari imbuhan Dr. McCoy. Halperkara kemudian dirujuk ke Mahkamah Tinggi melalui pernyataan kes di bawah perenggan 34, Jadual Kelima Akta. Yang arif hakim, dalam keputusannya yang berpihak kepada responden, merumuskan bahawa: (1) jumlah RM3 ribu sebulan tidak

berpadanan dengan status Dr. McCoy sebagai seorang konsultan dan pakar sakit puan dan ginaekologi kanan; (2) RM3 ribu sebulan hanyalah sebahagian dari imbuhan keseluruhan beliau dan 25% keuntungan bersih merupakan satu cara mengira gaji beliau yang selebihnya; (3) fakta bahawa 25% keuntungan bersih adalah berasingan dari jumlah RM3 ribu sebulan tidak bermakna bahawa jumlah yang selebihnya itu merupakan suatu bonus; dan (4) SC silap kerana tidak memberikan pertimbangan sewajarnya kepada fakta bahawa bayaran kepada Dr. McCoy terdiri dari dua bahagian walaupun terkandung dalam satu obligasi kontrak. Perayu kini merayu terhadap keputusan yang arif hakim sekaligus mengemukakan tiga kes sebagai sokongan, iaitu *Saledy Sdn Bhd v. Director General of Inland Revenue*, *Director General of Inland Revenue v. Highlands Malaya Plantation* dan *Director General of Inland Revenue v. Harrisons and Crosfield (M) Sdn Bhd.*

Diputuskan (menolak rayuan)
Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

(1) Kes *Director General of Inland Revenue v. Highlands Malaya Plantation* dan *Director General of Inland Revenue v. Harrisons and Crosfield (M) Sdn Bhd* boleh dibezakan dengan mudah dari rayuan semasa berdasarkan fakta serta faktor-faktor membezakan dalam perjanjian-perjanjiannya yang berkaitan. Di dalam kes *Harrisons and Crosfield*, bonus yang dipertikaikan telah diletak di bawah tajuk khas yang berasingan yang dipanggil Skim Imbuhan Tambahan. Di bawah tajuk ini, beberapa kakitangan pengurusan terpilih berhak untuk mengambil bahagian di dalam keuntungan di bawah kaedah-kaedah skim berkenaan. Ia adalah bersifat budibicara, tidak seperti gaji yang tidak boleh dianjak atau disemak menurut kehendak majikan. Imbuhan di bawah tajuk ini adalah terasing dan di luar dari gaji yang diberi kepada kakitangan pengurusan terpilih dan dianggap sebagai bayaran bonus.

(1a) Dalam kes *Highlands Malaya Plantation*, pendekatan yang diambil responden di situ adalah sama seperti di dalam *Harrisons and Crosfield*, dalam ertikata kakitangan pengurusan berhak untuk terlibat dalam skim bonus kumpulan seperti yang diperuntukkan oleh surat perlantikan standard. Manakala setiap kakitangan perkeranian pula dibayar bonus menurut budibicara responden. Mahkamah memutuskan

bahawa pembayaran mungkin berbentuk ehsan seperti di dalam kes kakitangan bukan pengurusan atau suatu bayaran kontraktual yang kakitangan pengurusan berhak kepadanya, namun ia masih tetap suatu bonus. Juga suatu fakta tidak dapat dinafikan bahawa dari awal-awal lagi kedua-dua kumpulan adalah dibayar di bawah skim yang menggunakan perkataan "bonus" dan dengan imbuhan tambahan tertakluk kepada budibicara responden.

(2) Kes *Saledy Sdn Bhd v. Director General of Inland Revenue* tidak membantu kes semasa oleh kerana yang arif hakim dalam kes itu tidak pernah pada bila-bila masa pun mengupas bagaimana beliau telah mencapai rumusan bahawa imbuhan tambahan adalah sebenarnya suatu bayaran bonus.

(3) Tiada apa pun yang menjelekkan tentang bagaimana responden merangka terma-termanya di sini. Apa yang dilakukan responden tidak lebih dari hanya menyusun halehwal perniagaan dan kewangannya dengan sebegitu cara bagi meminimakan tanggungan cukainya. Cara mengelakkan cukai sedemikian akan menurunkan serendah mungkin cukai pendapatannya, dan ianya adalah suatu tindakan yang rasional dan sah. Ia bukan seperti tindakan mengelak cukai oleh pembayar cukai yang merendah-rendahkan pendapatan bercukainya atau menuntut potongan yang tidak wujud yang mana adalah tidak sah.

(4) Tiada definasi statutori bagi perkataan "bonus" di dalam Akta. Untuk bantuan, rujukan harus dibuat kepada sumber-sumber lain bagi mencapai maksud perkataan tersebut, dan dalam halkeadaan kes, sama ada pembayaran kepada Dr. McCoy terangkum di bawahnya. Sumber-sumber menunjukkan pembayaran bonus adalah tambahan kepada gaji yang dibayar kepada pekerja, terasing dan lain dari imbuhan yang dipersetujui. Ia mungkin berbentuk suatu hadiah, suatu bantuan atau sesuatu yang diberi atas budibicara pemberi tanpa terikat dengan suatu imbuhan biasa yang dipersetujui dan termasuk bayaran yang harus dibayar atau yang diperuntukkan oleh kontrak. Dalam kes semasa, kewujudan niat untuk membuat bayaran tertangguh sebagai sebahagian dari imbuhan beliau dan bukannya bayaran bonus, adalah faktor penting dalam menentukan isu tersebut.

(5) Dokumen perkhidmatan Dr. McCoy adalah berbentuk kontraktual dan syarikat terikat dengannya. Membaca perjanjian sekali imbas menunjukkan bahawa 25% keuntungan bersih tidak bergantung kepada budibicara sesiapa, kerana sudah menjadi sebahagian dari perjanjian gaji. Tiada apapun yang diperkatakan mengenai peratus berkaitan dengan gaji, tetapi sebaliknya mengenai keuntungan tertangguh yang diperolehi di akhir tahun. Tiada yang menyukarkan mengenai perjanjian pekerjaan tersebut dan pada akhirnya ia hanyalah merupakan persoalan tafsiran dokumen berkaitan, fakta-fakta kes dan hubungan di antara pihak-pihak terbabit.

(6) Pendapatan seorang pegawai perubatan lain yang dikemukakan sebagai perbandingan menunjukkan ianya jauh lebih tinggi dari pendapatan Dr. McCoy, sekaligus membawa kepada rumusan tidak dapat tidak bahawa bayaran kontraktual 25% keuntungan bersih semestinya menjadi sebahagian dari pendapatan Dr. McCoy. Gaji sebanyak RM3 ribu sebulan adalah tidak sepadan dengan status dan kelayakan seorang konsultan dan bayaran tertangguh tersebut bukanlah suatu bayaran bonus. Ia sebaliknya adalah sebahagian dari pendapatan dari titik peluh beliau, walaupun ianya ditangguhkan dan tertakluk kepada keberuntungan seperti yang dihasratkan oleh pihak-pihak. Seperti yang didapati dengan betulnya oleh yang arif hakim, tiada keperluan untuk mengemukakan bukti kukuh bahawa pendapatan Dr. McCoy tidak berpadanan dengan statusnya sebagai seorang konsultan.

Case(s) referred to:

Ainley v. Edens (19) TC ***(refd)***

Director-General of Inland Revenue v. Harrisons & Crosfield (M) Sdn Bhd [1988] 2 CLJ 1; [1988] 1 CLJ (Rep) 34 ***(dist)***

Director-General of Inland Revenue v. Highlands Malaya Plantation [1988] 1 LNS 145 ***(dist)***

Great Western Garment Co Ltd v. Minister of National Revenue [1948] 1 DLR 225 ***(refd)***

Re Eddystone Marine Insurance Co [1894] WN 30 ***(refd)***

Saledy Sdn Bhd v. Director General of Inland Revenue [1994] 3 CLJ 492 HC ***(refd)***

Shelford v. Morsey [191] 1 KB 154 ***(refd)***

Sutton v. AG [1923] 39 TLR ***(refd)***

Legislation referred to:
Income Tax Act 1967, ss. 3, 33(1), 39(1)(h), 99

Other source(s) referred to:
Stirling J, *Words and Phrases Legally defined A-C,* 2nd edn, p 176

For the appellant - Abu Tariq Jamaluddin (Seri Hanem Mohd Ayob with him); Pegawai Undang-Undang LHDN
For the respondent - Vinayak Pradhan; M/s Skrine

[Appeal from High Court, Kuala Lumpur; Civil Appeal No: R3-14-8-1998]

[Editor's note: For the High Court judgment, please see Steruda Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2006] 4 CLJ 103.]

Reported by Usha Thiagarajah

JUDGMENT

Suriyadi Halim Omar JCA:

[1] The appeal heard by this panel was dismissed with costs.

[2] The issue for our consideration was whether the year-end payment of 25% of net profit of Steruda Sdn Bhd (the respondent) to one Dr. Ronald Stephen McCoy was a bonus payment or not. If it was, then it would be taxable as against the respondent, except the equivalent of two-twelfths of his salary of that payment. If not, it then becomes a part of Dr. McCoy's salary, and the whole amount would be deductible from the respondent's gross income and thus he would pay less tax. The restriction of deductibility regarding the bonus is legislated under s. 39(1)(h) of the Income Tax Act 1967 (the Act) a provision introduced by Act A273 effective from year of assessment 1975 onwards. The latter provision, repealed later by Act 619, reads as follows:

> 39 (1) Subject to any express provision of this Act, in ascertaining the adjusted income of any person from any source for the basis period for a year of assessment no deduction from the gross income from that source for that period shall be allowed in respect of:

(a) …;

(h) any sum paid by way of a bonus to an employee in excess of one thousand ringgit or two-twelfths of his wages or salary whichever is the greater …

[3] To appreciate the current appeal it is necessary that a brief clarification regarding the concept of the taxability of a person be made. Subject to s. 3 of the Act income tax shall be charged for each year of assessment upon income of any person accruing or derived from Malaysia, or received in Malaysia from outside Malaysia. 'Person' has a special meaning, and in the Act it includes a company, a body of persons, a corporation sole and even an individual though not a partnership.

[4] The income tax of a person is usually determined by the Ketua Pengarah Hasil Dalam Negeri (the appellant) after adjustments have been made from his gross income, with the resulting amount being 'adjusted income', in order to arrive at a chargeable income. The relevant provision on 'adjusted income' is s. 33 of the Act and it reads:

33 (1) Subject to this Act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained by deducting from the gross income of that person from that source for the period all outgoing and expenses wholly and exclusively incurred during that period by that person in the production of gross income from that source, including:

(a) …

(d) such other deductions as may be prescribed.

[5] Subsequently a revised assessment may be raised, on the grounds that the initial assessment is inadequate or the initial assessment has been wrongly assessed, additional chargeable income is detected, tax having been over assessed or actual income exceeds estimated income or *vice versa*. Be it for the initial assessment or revised one, a taxpayer aggrieved by the assessment may file an appeal to the appellant, who on receipt of a notice of appeal under s. 99 may review the assessment, and if the reviewed assessment is agreed upon, shall be deemed to be final and conclusive. Otherwise the matter may proceed to the Special Commissioners.

[6] Either party to proceedings before the Special Commissioners may appeal on a question of law against a deciding order made in those proceedings, or require the latter to state a case for the opinion of the High Court. A right of appeal against the decisions of the High Court on cases stated in respect of questions of law dealt by it is provided for statutorily in the Act.

[7] We now touch on the facts of the case and they are as follows. The respondent is a private limited company incorporated on 21 June 1975 and provides consultancy services in gynecology, obstetrics, and other branches of medicine. On 12 July 1976 the respondent entered into an employment agreement with the abovementioned Dr. McCoy, a shareholder and director of the respondent. Amongst the terms of the agreement were that Dr. McCoy was to be paid RM3,000 per month plus an annual 25% profit of the clinic. The detailed employment terms read as follows:

> NOW IT IS HEREBY AGREED as follows:
>
> ...
>
> (5) As remuneration for the service to be provided by the Consultant under this Agreement, the Employer shall:
>
> (a) pay the Consultant $3,000 per month plus 25% of net profit of the clinic; ...

[8] Later the appellant revised the tax computations of the respondent for the assessment years of 1978 to 1984. Seven notices of additional assessments dated 1 October 1986 were issued pursuant to the Act. By the issuance of those notices of additional assessment, it was obvious that the appellant had disallowed the deduction of Dr. McCoy's remuneration of 25% of net profit of the clinic from the gross income of the respondent for tax purposes. Only two-twelfths of the full 25% of the net profit of the clinic received by the latter was allowed to be deducted from the respondent's gross income. The appellant ventilated that in the event Dr. Mc Coy did not get the 25% net profit of the clinic for want of profits, his remuneration would be restricted to his monthly income of RM3,000. In a nutshell, that sum being a bonus payment, was caught by s. 39(1)(h) of the Act.

[9] The respondent had appealed to the appellant against that revised tax computation and the additional assessments but was unsuccessful. In the proceedings before the Special Commissioners of Income Tax, the respondent again argued that the payment of 25% of net profit of the clinic was part of the remuneration of Dr. Mc Coy as provided for under the Employment Agreement of 12 July 1976, and not a bonus payment. That being so, the whole amount was deductible under s. 33(1) of the Act, and not caught by s. 39(1)(h) of the Act. Regretfully the respondent also failed and the matter was referred to the High Court by way of case stated pursuant to para 34 of the fifth Schedule of the Act.

[10] At the High Court, with the onus on it to establish that it was not a bonus payment, the respondent successfully convinced the learned judge to reverse the finding of the Special Commissioners (para 13 Schedule 5). The learned judge concluded that the sum of RM3,000 a month was not a normal remuneration as it did not commensurate with the status of Dr. Mc Coy as a consultant and a senior obstetrician and gynecologist. The learned judge opined that the RM3,000 per month was only part of his total remuneration, with the 25% profit being simply a method of calculating the rest of the salary of Dr. R.S. Mc Coy.

[11] The learned judge opined that the Special Commissioners erred when they concluded that just because the component of payment of 25% of the net profit was over and above the monthly sum of RM3,000, the balance sum must be a bonus. Further the Special Commissioners erred when they failed to give due consideration to the fact that the payment to Dr. Mc Coy comprised two parts of a single contractual obligation.

[12] Being dissatisfied with that finding the appellant filed the relevant notice of appeal hence the matter before us. The appellant in the course of the appeal had occasion to refer to three cases for our consideration. They were *Saledy Sdn Bhd v. Director General of Inland Revenue* [1994] 3 CLJ 492; *Director General of Inland Revenue v. Highlands Malaya Plantation* [1988] 1 LNS 145 and *Director General of Inland Revenue v. Harrisons & Crosfield (M) Sdn Bhd* [1988] 2 CLJ 1; [1988] 1 CLJ (Rep) 34. In all these cases, the issues were the same, namely whether the additional remuneration received by the taxpayers, provided for in employment agreements were bonus payments or not.

[13] The facts of *Director General of Inland Revenue v. Harrisons & Crosfield (M) Sdn Bhd* are as follows. The respondent had employed several expatriates and a local executive, amongst many others, on the management staff, and were remunerated *inter alia* with paid fixed salaries and additional remuneration under a scheme called Additional Remuneration Scheme. The Additional Remuneration Scheme was based upon a percentage of the combined profits of the respondent. Another scheme which was in the nature of a bonus scheme also ran side by side with this Additional Remuneration Scheme but suffice to say that eligibility to join the latter was based on the discretion of the management. Once a person was under that scheme he was not entitled to the parallel bonus scheme (para 11 of the Rules of the Scheme). The appellant had concluded that the Additional Remuneration Scheme was in fact a form of bonus and thus had disallowed any deduction of the payments from the respondent's income. The appellant had submitted that s. 39(1)(h) was applicable.

[14] For better appreciation of this case we reproduce the relevant contractual provisions in the letter of appointment, and they are as follows:

> Salary: At the rate of M$2,100 per month. This salary includes an amount of M$400 per month consolidated from the additional remuneration scheme. (Please see below.)
>
> Additional Remuneration Scheme: You would be entitled to participate in profits under the rules of the additional remuneration scheme at the rate of 1/4 % of the adjusted net profits of Harrisons & Crosfield (Malaysia) Sdn. Bhd.
>
> The basis of participation of the staff as a whole is subject to review annually at 30 June and we must reserve the right to review individual rates at the same time. The amount of M$400 per month consolidated into basic salary is deductible from any amount of A.R.S becoming due for payment.

[15] Apart from the above terms there were other connected provisions that showed that the payments were reviewable and therefore not fixed. Under r. 5(a) and (c) of the Rules the additional remuneration due to the recipient would be a sum equivalent to a percentage of the profits of the respondent. The Supreme Court in the course of its deliberation found that the Additional Remuneration Scheme was of a separate and distinct character to that of the fixed salary. That being so the Additional

Remuneration Scheme could not be regarded as a deferred salary. The court also found that the rate of the Additional remuneration Scheme was reviewable by the respondent in contrast to fixed salaries.

[16] In *Director General of Inland Revenue v. Highlands Malaya Plantation* [1988] 1 LNS 145 the terms could only be gauged from the following passages as the specific provisions were not reproduced by the court:

> The managerial staff were each paid a monthly salary and in addition thereto they were entitled to participate in the group bonus scheme in accordance with the standard letters of appointment. On the other hand, the clerical staff (ie, the non-managerial staff) were each paid a bonus at the discretion of the respondent as there was no contractual obligation on the part of the respondent.
>
> In respect of the managerial staff, the scheme came into operation on 1 January 1961. It was based on a number of factors, vis. status of employees, amount of salary drawn, duration of service and planted acreage managed, for which points would be given for equitable distribution of a provision created by reserving 4% of the agricultural profits of "the groups". The amount of payment varied with the number of points earned by each participant. The respondent had been making bonus payments to its managerial staff since the scheme was introduced. As regards the non-managerial staff, for the last 12 years or so they received bonus payments annually in excess of two months' salary. The respondent does not dispute its liability to tax in respect of the discretionary bonus payments to its non-managerial staff in excess of two months salary. On the other hand, the managerial staff were paid under a contractual obligation tied to profitability and on appropriation of 4% of the agricultural profits of "the group".
>
> For the year of assessment 1975, the appellant disallowed for deduction from the gross income of the respondent the bonus paid to the managerial staff pursuant to the scheme in excess of the limits stipulated in section 39(1)(h) of the Income Tax Act 1967. Accordingly, by a notice of assessment dated 5 January 1980 the appellant informed the respondent that an additional assessment in the sum of $319,066.50 had been made for the year of assessment 1975.

The respondent contended that the additional remuneration paid to the managerial staff under the group bonus scheme was actually a commission while the appellant argued that the same was a bonus payment and as such for the year of assessment 1975, a sum of $319,066.50 was disallowed for deduction. In other words, the respondent disputed the applicability of section 39(1)(h) to the group bonus scheme of the managerial staff.

The question for the determination of the Special Commissioners was:

> Whether the additional remuneration paid to the administrative staff (i.e. the managerial staff) of the appellant under the scheme is a commission and therefore deductible as an expense wholly and exclusively incurred in the production of gross income of the appellant within the meaning of section 33 of the Income Tax Act 1967; or is a bonus payment within the meaning of section 39(1)(h) of the Act and therefore be disallowed as a deductible expense beyond the limits stipulated therein.

The Special Commissioners decided that it was a bonus payment. On appeal, Harun J. disagreed and held that it was a commission. Hence the appeal.

[17] It was conspicuously obvious that the two Supreme Court cases could easily be distinguished with the current appeal not only by virtue of the facts but also the distinguishing factors embedded in the respective agreements. In *Director General of Inland Revenue v. Harrisons & Crosfield (M) Sdn Bhd* the controversial bonus was compartmentalized under a separate and special heading; it was called Additional Remuneration Scheme. Under this heading selected managerial staff was entitled to participate in profits under the rules of the latter scheme. It had a discretionary quality, unlike salaries that were beyond adjustment or review on the whims and fancies of the employer (giver). The remuneration under this heading was over and above of the salary given to the selected managerial staff, and by whatever name one would call, if it were in the nature of bonus, contractual or not, if it fell under the purview of s. 39(1)(h) it would be treated as bonus. In *The Director-General of Inland Revenue v. Highlands Malaya Plantations Ltd* the approach of the respondent was quite similar to that of the *Director General of Inland Revenue v. Harrisons & Crosfield (M) Sdn Bhd* in that the managerial staff were entitled to participate in the

group bonus scheme in accordance with the standard letters of appointment. The clerical staff (ie, the non-managerial staff) were each paid a bonus at the discretion of the respondent. The court concluded that the payment could be gratuitous as in the case of the non-managerial staff or it may be contractual payment, to which the managerial staff was entitled as incentive, but nevertheless still a bonus. It was an undeniable fact too in this case nomenclature-wise, both groups were paid from the very beginning pursuant to a scheme that carried the word 'bonus', and with that additional remunerations being subject to the discretion of the respondent. The case of *Saledy Sdn Bhd v. Director General of Inland Revenue* [1994] 3 CLJ 492 regretfully was of no help in our discussion as the learned judge there never at any time discussed how he arrived at the conclusion that the additional remuneration was bonus. He merely said:

> It was agreed by both parties before the Special Commissioners that the limits imposed by s. 39(1)(h) of the Act is only applicable to employees. Since I hold that Dr. Yeo is an employee in the instant case this section therefore applies in respect of the 40% share of the profits subject to a maximum of RM100,000 per year which is clearly a bonus: *The Director-General of Inland Revenue v. Highlands Malaya Plantations Ltd* [1988] 2 MLJ 99.

[18] There was no detailed discussion on why and how the 40% of the share of the profits was declared bonus. Likewise the above case of *The Director-General of Inland Revenue v. Highlands Malaya Plantations Ltd* was only mentioned in passing, without any serious discussion being undertaken.

[19] It must be clarified in no uncertain terms that there was nothing sinister in the manner the respondent here had framed its terms here. It was merely arranging its business and financial affairs in such a way that would minimize its tax liability. This mode of tax avoidance would result in the lowest possible income tax for itself, a course of action that was rational and legal. Opposed to this is tax evasion, where taxpayers understate their taxable income or claiming fictitious deductions, and thus illegal *(Malaysian Income Tax* by Goh Chen Chuan).

[20] It is indisputable that there is no statutory definition of the word "bonus" in the Act. For assistance, a need arises for us to refer to other sources to arrive at the meaning of this word, and in the circumstances of this case, whether the payment to Dr. McCoy falls under it. In '*Words and Phrases Legally* defined (2nd edn) at p. 176 Stirling J in *Re Eddystone Marine Insurance Co.* [1894] WN 30 said:

> I adopt the definition of bonus given in the New English Dictionary *viz.* a "boon or gift over the above which is normally due as remuneration to the receiver, and which is therefore, something wholly to the good.

[21] In *Shelford v. Morsey* [191] 1 KB 154, Lord Reading CJ at pp. 158 and 159 said:

> The sole question in this case is whether or not a bonus agreed to be paid to a seaman as recorded in the ship's articles is to be treated as something apart from wages … "Bonus" in such a case as the present one is in truth nothing else but an euphemism for "additional to wages".

[22] In *Sutton v. A.G* [1923] 39 TLR pp. 294 at 297 Lord Birkenhead had said:

> The term "bonus" may of course be properly used to describe payment made of grace and not as of right. But nevertheless may also include as here payments made because legally due, but which the parties contemplate will not continue definitely.

[23] In *Great Western Garment Co. Ltd v. Minister of National Revenue* [1948] 1 DLR 225, Exchequer Court of Canada, O' Conner J at 233 said:

> Bonus is not defined by the Order but the meaning given by the Webster's International Dictionary is "Something given in addition to what is ordinarily received by or strictly due to the recipient." *The Oxford Concise Dictionary* defined bonus as "Something to the good, into the bargain (and as an example) … gratuity to workman beyond their wages.

[24] From the definitions supplied above, bonus may have certain characteristics. To start with, it is in addition to the wages paid to an employee, something that is over and above the agreed remuneration. It may be in the nature of a gift, a temporary boon or something freely given at the discretion of the giver as opposed to being an agreed normal remuneration, and includes payment which is legally due or contractually provided for.

[25] To ensure that the terminology of bonus under discussion falls within the context of the Act, the presence of intention to make the deferred payment as part of his remuneration, and not a bonus payment, is a cogent factor, and will play an important role in the circumstances of the case. That being so, the four corners of Dr. McCoy's employment agreement must be scrutinized as a whole, and thereafter decide under what category the 25% payment falls under. To quote Finley J in *Ainley v. Edens* (19) TC p 311:

> ... of course, one has not merely to be tied to a word, one has to look at the document as a whole and arrive at a conclusion as to what the thing really is.

[26] Dr. McCoy's employment document is contractual in nature and the company is bound by it. A simple reading of the agreement shows that the 25% payment is not at the discretion of anyone, it being part and parcel of the salary agreement, with nothing being said of percentages in relation to the salary, but rather to some deferred ascertainable profit at the end of the year. There was nothing complicated about the employment agreement and at the end of the day it was just a question of construction of the relevant document, the facts of the case and the relationship between the relevant parties.

[27] No doubt if there is no profit then Dr. McCoy receives no additional remuneration; likewise if the yearly profit is small then he receives a small but fixed 25% payment. This 25% payment is not a large percentage when compared with the 40% as agreed by parties in *Director-General of Inland Revenue v. Highlands Malaya Plantations Ltd.* But what is pertinent and obvious is that the payment however small, is not discretionary and subject to the tender mercies of the employer, or the percentage subjected to review. It shall be paid out like any normal earning as demanded by the agreement. In contradistinction, in a company where employees do receive bonuses, not every profitable year will guarantee receipt of bonuses, as there is no obligation on the part of the employer to pay something to the employee over and above the normal remuneration.

[28] Sifting through the evidence (rekod rayuan pp. 306-308) and for comparison purposes, we were not unmindful of the income of another medical practitioner, one Dr. R. Menon for the years of assessment of 1978, 1979 and 1980, respectively at RM338,337,

A RM348,000 and RM377,516. On average he earned RM28,197.74 per month in 1978, RM29,000 per month for 1979 and RM31,458.66 per month for 1980. Compare this with Dr. McCoy's yearly RM36,000 per year or RM3,000 per month! It does not take much effort and time to conclude that the
B contractual 25% yearly payment must surely be part of Dr. McCoy's earnings. To restate our findings, read together with the salary of RM3,000, which did not commensurate with a consultant's status and qualification, the deferred payment by no figment of the imagination could be termed a bonus payment. It
C was part of his hard-earned income, though deferred and subject to profitability, as intended by parties. It was also our view that, for something that was so obvious, there was no necessity to adduce cogent evidence merely to establish that the pay of Dr. McCoy did not commensurate with his status as a consultant (as
D also found by the learned judge).

[29] Based on all the above reasons we dismissed the appeal with costs.

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